92-236

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

WILLARD L. PETERS AND EARL DEJOURNETT, JR.,
Petitioners,

vs.

THE STATE LOTTERY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state statute be applied retroactively to deprive state lottery players of their right to lottery jackpots and impair the lottery players' right to the performance of their contract with the state, in contravention of Article I, Section 10 of the United States Constitution?

2. May a state court deprive state lottery players of their property, namely the other half of their lottery jackpots, by misconstruing a state statute such as to violate the lottery players right to due process pursuant to the Fourteenth Amendment to the Constitution?

PARTIES BELOW

Willard Peters and Earl DeJournette, Jr., petitioners herein, and the State Lottery Commission of Ohio, respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED .. 4

STATE STATUTE INVOLVED 5

STATE RULES INVOLVED 6

STATEMENT OF THE CASE 7

A. Trial Court Proceedings 7

B. Court of Appeals Proceedings 10

C. Ohio Supreme Court Proceedings 10

REASONS FOR GRANTING THE WRIT 11

1. A statute may not be applied retroactively to deprive state lottery players of their right to lottery jackpots and impair their right to contract with the state in contravention of Article I, Section 10 of the United States Constitution 11

2. A state court cannot deprive state lottery players of their property by misconstruing a state statute such as to violate due process pursuant to the Fourteenth Amendment to the Constitution. 14

CONCLUSION 15

APPENDIX:

Opinion of the Supreme Court of Ohio (March 25, 1992) A1

Opinion of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio (December 18, 1990) A9

Judgment Entry of the Court of Appeals for the Tenth Appellate District, Franklin County, Ohio (December 19, 1990) A25

Decision of the Court of Claims of Ohio (January 19, 1990) A26

Order of the Supreme Court of Ohio Denying Petition for Rehearing (May 6, 1992) A34

Ohio Administrative Code 3770:1-7-33 ..... A35

Ohio Administrative Code 3770:1-7-45 ..... A40

Ohio Revised Code 3770.07 ..... A45

TABLE OF AUTHORITIES

Cases:

Bouie v. Columbia, 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964) 14

Charles River Bridge v. Warren Bridge, 36 U.S. 420, 11 Pet. 420, 9 L. Ed. 773 (1837) 13

Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990) 13

Peters, et al. v. Ohio State Lottery Commission, 63 Ohio St. 3d 296 (1992) 12

Wolf v. McDonnell, 418 U.S. 539 (1974) 14

Constitution:

United States Constitution, Article I, Section 10 4,11

United States Constitution, Fourteenth Amendment. 4,14

Statute:

Ohio Revised Code Section 3770.07 5,7,10,13,14,15

Rules:

Ohio Administrative Code Section 3770:1-7-33 . 6,10,11,12

Ohio Administrative Code Section 3770:1-7-45 . . 6,9,10,11

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioners Willard Peters and Earl DeJournett, Jr., respectfully pray that a Writ of Certiorari issue to reverse the decision of the Ohio Supreme Court of March 25, 1992, rehearing denied May 6, 1992, affirming the judgment and decision of the Franklin County Court of Appeals.

OPINIONS BELOW

This action was originally filed in the Court of Claims of Ohio by Petitioners against the State Lottery Commission of Ohio. Petitioners' Complaint asked that they be awarded the other half of lottery jackpots which had been won by Petitioners. The Court of Claims ruled against Petitioners, which Decision was affirmed by the Franklin County Court of Appeals of Ohio. Upon Motion to Certify the Record, the Supreme Court of Ohio heard the case, and entered Judgment affirming the Franklin County Court of Appeals on March 25, 1992. Petitioners' Motion for Rehearing was denied on May 6, 1992. This Petition is now filed seeking review of the Ohio Supreme Court Decision.

The opinions of the Court of Appeals for Franklin County, and the Court of Claims of Ohio, are attached hereto in the Appendix.

JURISDICTION

Petitioners' Motion for Rehearing of the Judgment of the Ohio Supreme Court was denied May 6, 1992, and this Petition for Writ of Certiorari has been filed within ninety (90) days thereof. This Court has jurisdiction to grant this Petition under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 10:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports, or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
>
> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit delay."

United States Constitution, Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTE INVOLVED

Ohio Revised Code Section 3770.07. Award of prizes; "second-chance" drawings; unclaimed lottery prizes fund. The text of this statute can be found in the Appendix.

STATE RULES INVOLVED

Ohio Administrative Code Section 3770:1-7-33, and Ohio Administrative Code Section 3770:1-7-45. The text of these rules can be found in the Appendix.

STATEMENT OF THE CASE

A. Trial Court Proceedings.

Petitioners Peters and DeJournett were both players of the State of Ohio lottery games. Peters purchased a ticket for the Super Lotto game drawing of July 30, 1986, at which time the Super Lotto jackpot was guaranteed to be Five Million Dollars ($5,000,000.00). The rules for the Super Lotto game provided that players presenting valid winning tickets which had all six (6) numbers drawn would participate in the jackpot.

The six (6) numbers drawn in the Super Lotto drawing of July 30, 1986, matched the six numbers on the ticket which Peters had purchased for the drawing. Subsequently, Peters presented his ticket to the State Lottery Commission (hereinafter "Lottery"). The Lottery informed Peters that his was a valid winning ticket, but that the Lottery Computer showed that another ticket with all six (6) numbers had been sold. On this basis, the Lottery awarded Peters half of the jackpot, Two Million Five Hundred Thousand Dollars ($2,500,000.00), to be paid in twenty (20) yearly installments.

The purported other ticket as indicated by the Lottery computer was never claimed or presented to the Lottery for payment. Ohio Revised Code Section 3770.07 provides now, and did then, that "Lottery prize awards shall be claimed by the holder of the winning lottery ticket, . . . within one year of the date on which such prize award was announced." The date on which Peters' prize award was announced was the drawing date of July 30, 1986. Due to the fact that more than one (1) year had passed without the purported other ticket being presented to the Lottery, Peters believed that he was entitled to the entire jackpot of Five Million Dollars

($5,000,000.00), as he was the holder of the only valid ticket presented for payment. The Lottery disagreed, characterizing the other half of Peters' Jackpot as an "unclaimed prize".

Petitioner Earl DeJournett, Jr., purchased a ticket for the Lotto game drawing of February 28, 1987. His situation was parallel to that of Peters. DeJournett's ticket bore the same six (6) numbers as were drawn on February 28, 1987. When DeJournett presented his ticket to the Lottery, he was advised that his ticket was valid, and that the Lottery computer showed that another ticket with all six (6) numbers had been sold. The Lottery on that basis awarded DeJournett Six Hundred Thirty-One Thousand Three Hundred Nineteen Dollars ($631,319.00) which was half of the actual jackpot of One Million Two Hundred Sixty-Two Thousand Six Hundred Thirty-Eight Dollars ($1,262,638.00). Once again, as was the case with Peters' jackpot, the purported other ticket was never presented for payment. After a year had passed without the purported other ticket being claimed, DeJournett demanded that the lottery award him the entire jackpot on the basis that he was the only one to present a valid winning ticket for the jackpot. As with Peters' claim, the Lottery refused to award the other half to DeJournett, asserting that the other half was an "unclaimed prize".

On May 12, 1988, Petitioners as Co-Plaintiffs filed the Complaint in this action in the Court of Claims of Ohio, against the Lottery, asking that Petitioners be awarded the other half of their respective jackpots. The Complaint stated causes of action sounding in deceptive sales practices, detrimental reliance, promissory estoppel and contract.

A portion of the Complaint filed stated as follows:

"9. The Lottery has never established that an additional valid winning ticket, other than the one purchased by Plaintiff Willard L. Peters, was sold for the Super Lotto drawing of July 30, 1986, which bore the six numbers drawn in that drawing.

10. Ohio Administrative Code Section 3770:1-7-45, pertaining to Super Lotto, provides in paragraph (D)(4) thereof that: 'For each ticket bearing a selection which matches all six integers drawn, a prize equal to seventy percent (70%) of fifty percent (50%) of total sales for that drawing (hereinafter "Jackpot"), divided by the number of *winning* selections, rounded to the next lowest whole dollar amount' (Emphasis added).

11. The ticket purchased by Plaintiff Willard L. Peters, together with the statutes, and rules and regulations, pertaining to Super Lotto, constitute a written contractual agreement between the Lottery and Plaintiff Willard L. Peters.

12. By the terms of said written agreement, Plaintiff Willard L. Peters is entitled to the total announced jackpot of Five Million Dollars ($5,000,000.00) for the Super Lotto drawing of July 30, 1986, unless other 'winning' selections were made for all six numbers drawn.

13. No valid ticket was presented to the Lottery, within the one year period allowed for such presentment, concerning the jackpot for the Super Lotto drawing of July 30, 1986, other than the ticket presented by Plaintiff Willard L. Peters.

14. Therefore, there was no 'winning' selection for the jackpot, other than the one made by Plaintiff Willard L. Peters.

15. Plaintiff Willard L. Peters is therefore entitled to the other half of the Super Lotto jackpot of the drawing of July 30, 1986."

A similar count was included in the Complaint pertaining to DeJournett's claim, except that the Ohio Administrative Code Section for his game was 3770:1-7-33, which contained the same language as 3770:1-7-45.

After a trial on the merits, the trial court ruled in favor of defendant. The Judge's Decision offered no analysis of the applicable rules and regulations, or statutes, which governed the breach of contract issues raised by the Petitioners.

B. Court of Appeals Proceedings.

On February 16, 1990, Petitioners filed their appeal in the Court of Appeals for Franklin County, Ohio. In the appeal, the Petitioners once again raised the issue of the contract which terms were set by the rules and regulations of the Lottery. On December 18, 1990, the Court of Appeals affirmed the Trial Court's Opinion without any discussion as to the Lottery's rules and regulations.

C. Ohio Supreme Court Proceedings.

Petitioners filed a Motion to have the Court of Appeals record reviewed by the Supreme Court of Ohio. The Court on May 15, 1991, granted Petitioners' Motion to certify the record.

On May 6, 1992, the Ohio Supreme Court entered its Judgment Affirming the Court of Appeals. Once again there was no discussion of the rules and regulations of the Lottery as they pertained to the contract between the parties.

Petitioners filed their Motion for Rehearing, in which they pointed out that the Ohio Supreme Court's application of Ohio Revised Code Section 3770.07(B) resulted in that Statute's impairment of Petitioners' right to contract with the Lottery. The Motion for Rehearing was denied on May 6, 1992, without opinion.

REASONS FOR GRANTING THE WRIT

1. A statute may not be applied retroactively to deprive state lottery players of their right to lottery jackpots and impair their right to contract with the state in contravention of Article I, Section 10, of the United States Constitution.

The lottery games in question herein were governed by rules which were adopted by the Lottery through administrative procedures, and made a part of the Ohio Administrative Code. The lottery game won by petitioner Peters was known as "Super Lotto," and was adopted as Ohio Administrative Code Section 3770:1-7-45 ("Rule 45"), effective March 1, 1986 (See Appendix, A40). The lottery game won by petitioner DeJournett was known as "Lotto" and was governed by Ohio Administrative Code Section 3770:1-7-33 ("Rule 33"), which was effective with regard to its jackpot provisions on March 11, 1983 (See Appendix, A35).

The relevant provisions of Rule 45 which determine how jackpots are shared occur in paragraph (D) as follows:

> "(D) Structure, nature and value of prize awards. Based upon the numbers drawn in each regular drawing for game number thirty-three, prizes shall be awarded to *holders of valid tickets* for that drawing as follows:
>
> * * * * *
>
> "(3) For each *ticket* bearing a *selection* which matches all six integers drawn, a prize equal to forty-two percent of fifty percent of total sales for that drawing (hereinafter "Jackpot"), divided by the number of *such winning selections,* rounded to the next lowest whole dollar amount. . . ." (Emphasis added).

Rule 33 contains the same language relevant to the sharing of jackpots. Petitioners argued that these rules provisions, together with the advertising which stressed that one winner would win the entire jackpot, constituted the state's contractual offer. As no other valid winning ticket had been presented, petitioners believe that the State of Ohio had breached its contract by refusing to pay the entire jackpots to petitioners.

The Ohio Supreme Court in its decision in this matter, rendered in *Peters, et al. v. Ohio State Lottery Commission*, 63 Ohio St. 3d 296 (1992), held at 298:

> "All parties to this action agree that the sale and purchase of a lottery ticket is governed by contract laws."

Also at 298, the Ohio Supreme Court stated its rationale as to why petitioners contract argument must fail, as follows:

> "In support of their contract theory, appellants argue that the rules contained on the ticket and betting card do not indicate any limit on the jackpot award. Similarly, as to the consumer fraud claim, appellants posit that none of the lottery advertisements contains adequate and proper notice to how the lottery's rules dictate the manner in which unclaimed prizes are to be handled. However, appellants mistakenly contend that the rules and regulations of the lottery commission alone control the distribution of any unclaimed prize money.
>
> "R.C. 3770.07 provides statutory authority which determines the manner in which prize money is awarded, how unclaimed prize money is disbursed, and where these funds are to be deposited. R.C. 3770.07 states in part:
>
> "(A) Lottery prize awards shall be claimed by the holder of the winning lottery ticket, *** within one year of the date on which such prize award was

announced. Except as otherwise provided in division (B) of this section, if no valid claim to the prize award is made within the prescribed period, the prize money *** shall be returned to the state lottery fund and distributed in accordance with section 3770.06 of the Revised Code.

* * *

"(B) ***

"There is hereby established in the state treasury the unclaimed lottery prizes fund, to which *all unclaimed prize awards* shall be transferred. ***" (Emphasis by the Court).

The provisions of R.C. 3770.07 (B) did not come into existence until June 24, 1986, which was after the rules for both lottery games became effective which governed the contractual obligations of the State of Ohio with respect to those games. These rules were never changed prior to the petitioners winning their jackpots.

That the states are prohibited from passing legislation impairing contracts to which the state is a party is well established. See *Hoffman v. City of Warwick*, 909 F.2d 608 (1st Cir. 1990). It has likewise been held by this Court that if vested rights exist, a state law cannot be passed which impairs the obligation of contract with respect thereto. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 11 Pet. 420, 9 L. Ed. 773 (1837).

The application of R.C. 3770.07 (B) to the claims of petitioners impaired their right to contract with the State of Ohio.

2. A state court cannot deprive state lottery players of their property by misconstruing a state statute such as to violate due process pursuant to the Fourteenth Amendment to the Constitution.

Petitioners further contend that the act of the Ohio Supreme Court in construing R.C. 3770.07 (B) was capricious, arbitrary, and done to avoid liability on the part of the State of Ohio. Due Process is required so that citizens may be protected from losing their property through arbitrary action of government. *See Wolf v. McDonnell*, 418 U.S. 539 (1974).

That the state judiciary may violate due process when construing an otherwise valid state statute was established in *Bouie v. Columbia*, 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

In the instant case, the holding of the Ohio Supreme Court that the provisions concerning "unclaimed prizes" contained in R.C. 3770.07 (B) were controlling was capricious and arbitrary. The very argument of petitioners was that because of the operation of the rules of their respective games, the other half of the jackpots were not "unclaimed prizes." Petitioners asserted that the jackpots had been claimed by one valid winner, being the petitioners, and that therefore the entire jackpots had been claimed.

For the Ohio Supreme Court to state a conclusion that the other half of the jackpots were "unclaimed prizes" without any consideration of the rules, represented an arbitrary finding depriving petitioners of due process under the Fourteenth Amendment.

CONCLUSION

Petitioners were impaired in their contractual rights in that the State of Ohio breached its agreement with petitioners, relying on the retroactive operation of R.C. 3770.07 (B) to abridge the State's contractual obligation.

Petitioners were denied Due Process through the arbitrary act of the state judicial system in construing R.C. 3770.07 (B) to relieve the State of its obligation to petitioners, thus depriving them of a property right.

A Writ of Certiorari should issue to review the Judgment of the Ohio Supreme Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided March 25, 1992)

No. 91-331

THE SUPREME COURT OF OHIO

WILLARD PETERS, *et al.*,
Appellants/Cross-Appellees,

v.

STATE LOTTERY COMMISSION,
Appellee/Cross-Appellant.

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[296] [Cite as *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296]

State lottery—Unclaimed prize money—Lottery commission is mandated by law to deposit any and all unclaimed prize money into the unclaimed lottery prizes fund and to distribute the monies pursuant to R.C. 3770.06.

(No. 91-331—Submitted January 15, 1992—Decided March 25, 1992.)

APPEAL and CROSS-APPEAL from the Court of Appeals for Franklin County, No. 90AP-194.

Appellant and cross-appellee Willard Peters selected the winning numbers in the July 30, 1986 drawing of the Ohio Super Lotto. Likewise, on February 28, 1987, appellant and cross-appellee Earl DeJournett, Jr. selected the winning numbers in the Ohio Lotto drawing.

However, for each of these drawings the appellee and cross-appellant, Ohio State Lottery Commission, announced that two tickets had been purchased with the winning numbers.

The lottery commission informed Peters that he had won $2,500,000, or half of the $5,000,000 jackpot in his drawing. On September 11, 1986, Peters accepted his first installment of $100,000 per year for the next twenty years. DeJournett was told he had won $630,819 of the $1,261,638 jackpot for the drawing in which he selected the winning numbers. On April 16, 1987, Dejournett received his first payment of $25,232.76 per year for the next twenty years.

However, in both drawings, the second winner determined by the lottery commission did not claim his or her prize money within one year of the drawing. On May 20, 1987, Peters wrote a letter to the lottery commission seeking to claim the remaining one half of the jackpot for the drawing in which he selected the winning numbers. The lottery commission rejected the claim, stating that the lottery is required by R.C. 3770.07 to transfer unclaimed prize money to the unclaimed prize fund in the state treasury, and that the money is to be used for future games to generate new state revenues for schools.

Peters and DeJournett ("appellants") filed a complaint in the Court of Claims against the Ohio State Lottery Commission, essentially alleging causes of action for breach of contract and deceptive sales practices under R.C. Chapter 1345. Prior to trial the lottery commission filed a motion to disquali[297]fy plaintiffs' counsel, asserting that counsel's participation may violate various Canons of Professional Responsibility. The basis for the

motion was that plaintiffs' counsel had previously served as deputy director and legal advisor for the lottery commission when the framework and rules for the games in question were being developed. The trial judge denied the motion. After a trial on the merits, the Court of Claims rendered judgment in favor of the lottery commission and dismissed the complaint. Peters and DeJournett filed a timely appeal, and the lottery commission cross-appealed the denial of its motion for disqualification of counsel. The court of appeals affirmed, finding no merit as to the appeal by Peters and DeJournett, and also no merit as to the cross-appeal by the lottery commission.

This case is before this court pursuant to the allowance of a motion and cross-motion to certify the record.

Ross F. Sprague, for appellants and cross-appellees.

Lee I. Fisher, Attorney General, *Simon B. Karas* and *Christopher C. Keller*, for appellee and cross-appellant.

ALICE ROBIE RESNICK, *J.* Appellants advance several arguments in support of their position that they are entitled to the unclaimed prize money from the drawings for which they selected the winning numbers. Additionally, appellants assert that the Court of Claims erred when it allowed into evidence certain computer records over their hearsay objection. In its cross-appeal, the lottery commission renews its argument that the Court of Claims should have disqualified appellants' counsel. We shall address these issues seriatim.

I

Appellants contend that the terms of a contract for the sale of a lottery ticket between the State Lottery Commission and its customer consist of those terms that appear on the face of the subject lottery ticket. Appellants also argue that the lottery commission violated the Consumer Sales Practices Act (R.C. Chapter 1345) by failing to disclose in its promotional material a limitation on the manner in which jackpot money would be distributed. Appellants also assert that the lottery commission did not notify its customers of any rules or regulations that might reduce the jackpot awards by a portion thereof being kept as an "unclaimed prize."

A common theme permeates appellants' assertions as set forth above. Each argument relies on the lack of adequate notice of the lottery's rules and regulations to support the contention that the appellants are entitled to the [298] unclaimed portion of the drawings wherein they selected the winning numbers. In support of their contract theory, appellants argue that the rules contained on the ticket and betting card do not indicate any limit on the jackpot award. Similarly, as to the consumer fraud claim, appellants posit that none of the lottery advertisments contains adequate and proper notice of how the lottery's rules dictate the manner in which unclaimed prizes are to be handled. However, appellants mistakenly contend that the rules and regulations of the lottery commission alone control the distribution of any unclaimed prize money.

R.C. 3770.07 provides statutory authority which determines the manner in which prize money is awarded, how unclaimed prize money is disbursed, and where these funds are to be deposited. R.C. 3770.07 states in part:

"(A) Lottery prize awards shall be claimed by the holder of the winning lottery ticket, *** within one year of the date on which such prize award was announced. Except as otherwise provided in division (B) of this section, if no valid claim to the prize award is made within the prescribed period, the prize money *** shall be returned to the state lottery fund and distributed in accordance with section 3770.06 of the Revised Code.

"***

"(B) ***

"There is hereby established in the state treasury the unclaimed lottery prizes fund, to which *all unclaimed prize awards* shall be transferred. ***" (Emphasis added.)

Under our interpretation of this statute, the lottery commission is mandated by law to deposit any and all unclaimed prize money into the Unclaimed Lottery Prizes Fund and to distribute the monies pursuant to R.C. 3770.06. Appellants do not, and indeed cannot, claim that they lacked notice of this statutory requirement.

Appellants' contentions must fail for yet other reasons. All parties to this action agree that the sale and purchase of a lottery ticket is governed by contract law. See Annotation (1985), 40 A.L.R. 4th 662. The lottery card on which a player chooses the numbers he or she wishes to play contains the following language: "UPON PURCHASE OF A TICKET, PLAYERS AGREE TO ABIDE BY ALL RULES AND REGULATIONS OF THE OHIO LOTTERY COMMISSION." As the court of appeals correctly noted, appellants agreed to be bound by all the rules and regulations of the lottery

commission. Hence, appellants cannot now claim they were unaware of the rules and regulations pertaining to the distribution of unclaimed prize money.

[299] Moreover, appellants readily admit that had they known they were entitled to only that portion of the total jackpot corresponding to the number of winning tickets sold, both would have played the lottery anyway. In fact, appellants concede that they played the lottery on a regular basis. Therefore, appellants cannot now claim any detrimental reliance on the advertising or promotional devices employed by the lottery commission. For these reasons, we reject appellants' argument that they are entitled to the unclaimed half of their respective drawings.

Appellants also assert that the Court of Claims erred in admitting certain computer records of the lottery commission into evidence over their hearsay objection. Conversely, the lottery commission argues that the computer records properly fall within the business-record exception for hearsay under Evid.R. 803(6). The admission of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon the showing of an abuse of that discretion. *Renfro v. Black* (1990), 52 Ohio St.3d 27, 32, 556 N.E.2d 150, 156. See, also, *National City Bank v. Fleming* (1981), 2 Ohio App.3d 50, 56, 2 OBR 57, 63, 440 N.E.2d 590, 598 (admissibility of business records pursuant to Evid.R. 803[6] rests within sound discretion of trial court and determinations thereunder will not be reversed absent a clear abuse of discretion).

Evid.R. 803 provides as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

"***

"(6) *** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness ***, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. ***"

The record in the present case adequately demonstrates that the computer records admitted into evidence were kept in the regular course of business and were compiled as a regular practice by a person with actual knowledge. Moreover, the records may be kept "in any form." Upon considering the arguments of the parties and the record in this case, we find no abuse of discretion on the part of the Court of Claims in allowing the computer records into evidence.

Appellants also contend that these computer records are so untrustworthy as to be inadmissible. However, there was no evidence presented that the [300] lottery commission's computer either malfunctioned or otherwise produced unreliable information on the dates in question, *i.e.*, when appellants selected the winning numbers in the respective drawings. In the absence of some evidence on this point, we again find no abuse of discretion in allowing the computer records into evidence.

II

In its cross-appeal, the lottery commission argues that the Court of Claims erred in not disqualifying appellants' counsel because such counsel was at one point a deputy director of the lottery commission, and also was instrumental in formulating the rules and regulations under which the lottery operates. The lottery commission also asserts that counsel's participation could lead to a violation of certain Disciplinary Rules, *i.e.*, DR 9-101(B), 5-101(B) and 5-102(B).

However, the court of appeals correctly assessed this argument when it stated: "*** [Counsel's] prior connection goes only to his legal expertise in the area and his ability to represent *** [appellants]. No unfair advantage as to factual or confidential matters prejudicial to the state [is] involved." Because there has been no showing that the lottery commission was prejudiced, and because appellants' counsel was not called as a witness, the lottery commission's argument is without merit.

The judgment of the court of appeals is hereby affirmed in all respects.

Judgment affirmed.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT and H. BROWN, *JJ.*, concur.

OPINION OF THE COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

(Rendered December 18, 1990)

No. 90AP-194

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

WILLARD PETERS, *et al.*,
Plaintiffs-Appellants,
(Cross-Appellees),

v.

THE STATE LOTTERY COMMISSION,
Defendant-Appellee,
(Cross-Appellant).

OPINION

APPEAL from the Ohio Court of Claims.

WHITESIDE, *J.*

Plaintiffs, Willard Peters and Earl DeJournett, Jr., appeal from a judgment of the Ohio Court of Claims rendered in favor of defendant, State of Ohio, acting through the Ohio Lottery Commission ("commission"), on plaintiffs' claims for breach of contract and unfair or deceptive sales practices resulting from plaintiffs' purchase of lottery tickets. Plaintiffs raise the following six assignments of error:

> "1. It was error for the Court of Claims to rule that the Lottery's jackpot advertising did not constitute unfair or deceptive sales practices under R.C.

1345.02 and R.C. 1345.03 (Page 6 of *Decision*) after finding (1) that such advertising '. . . apparently led Plaintiffs to believe that if [2] only one "winner" were to "claim" a jackpot, th(e)n that winner would also be entitled to any and all unclaimed monies from that particular drawing . . .' (Page 4 of *Decision*), (2) that the '. . . defendant's advertising does not specifically state that unclaimed prizes are retained by defendant . . .' (Page 6 of *Decision*), and (3) that the Lottery's advertising was 'offensive' (Tr. 489, lines 8-10). *Thomas v. Sun Furniture and Appliance Co.* (1978), 61 Ohio App. 2d 78; Ohio Administrative Code 109:4-3-02.

"2. It was error to decide on the evidence presented at the trial that the contract and agreement of the parties involved anything other than that which appeared on the face of subject Lottery tickets and the advertising and promotional material used to promote said game. *Jean H. Carson, et al., v. The Ohio Lottery Commission* (1980), No. 79-AP-558 and *Frieda Howard v. The Ohio Lottery Commission* (1980), No. 79-AP-559.

"3. It was error for the Court of Claims to rule that:

" '. . . the words "winning ticket" do not connote presentment of a ticket but rather the information supplied to defendant through its computer system *identifying* the number of winning selections out of the player pool . . .' *Jean H. Carson, et al., v. The Ohio Lottery Commission* (1980), No. 79-AP-558 and *Frieda Howard v. The Ohio Lottery Commission* (1980), No. 79-AP-559; R.C. 3770.07; O.A.C. 3770:1-7-33; O.A.C. 3770:1-7-45; O.A.C. 3770:1-8-04; *Attorney General's Opinion Letter* of May 22, 1987 to the Executive Director of the Ohio Lottery Commission.

"4. It was error for the Court of Claims to conclude that the Lottery was entitled to claim the jackpot shares in question under the 'unclaimed prize' provisions of R.C. 3770.07(B).

"5. The Court of Claims erred in overruling plaintiffs' motion to exclude from evidence as Totem Pole hearsay the Lottery's computer output of ticket sales. *Schmitt v. Casting Co.* (1944), 143 Ohio St. 421, 425; *Zeigler Milling Co. v. Denman* (1946), 79 App. 250, Staff Notes of Evidence Rule 803(8); *Westinghouse Electric v. Dolly Madison Leasing & Furniture Corp.* (1975), 42 Ohio St. 2d 122.

[3] "6. It was error for the Court of Claims to admit the Lottery's computer printout into evidence when it is the product of a uniquely complex business record system which yearly experienced millions of 'Errored Transactions,' millions of cancelled wagers and thousands of operating problems including an average of over two problems per month per wagering terminal. *Robinson-Lloyds, Ltd., Appellee v. Department of Liquor Control of the State of Ohio, Appellant,* (1952), 91 Ohio App. 521; Ohio Rule of Evidence 803(6); Ohio Rule of Evidence 803(8)."

The state raises the following three cross-assignments of error:

"1. The court below erred in not granting the state's motion for dismissal at the end of appellants' case in chief.

"2. The court below erred in finding the lottery within the terms of Ohio's Consumer Sale[s] Practices Act.

"3. The court below erred in not disqualifying counsel upon a showing of potential violations of the Code of Professional Responsibility."

On July 30, 1986, Willard Peters selected the winning numbers in the Ohio Super Lotto drawing. Similarly, on February 28, 1987, Earl DeJournett, Jr., selected the winning numbers in the Ohio Lotto drawing. Both lotteries are pari-mutuel games in which players select from a pool of forty numbers in the Ohio Lotto and forty-four numbers in the Ohio Super Lotto. To be entitled to the winning jackpot, a purchaser of a ticket must have selected the six numbers determined by the commission to be the winning selection. Both plaintiffs were determined to be winners of the respective drawings. However, because the lottery computers indicated that two winning tickets had been purchased in each drawing, each plaintiff received only one-half of the respective jackpots. Mr. DeJournett, for example, was awarded $630,819 out of a $1,261,638 jackpot, and Mr. Peters [4] was awarded $2,500,000 out of a $5,000,000 jackpot. These prizes will be disbursed to plaintiffs over a twenty-year period.

When the other holder of the winning ticket in each drawing did not present that ticket to the commission within the one-year limitations period, plaintiffs requested that the commission pay each of them the other half of the jackpot to which they believed they were entitled. Plaintiffs claimed that as the only holders of valid winning tickets they each were entitled to the entire amount of the respective jackpots. After the commission refused to pay the other half of the jackpots to plaintiffs, plaintiffs brought suit against the commission alleging breach of contract and unfair or deceptive sales practices under R.C. 1345.02 and 1345.03. This action was commenced in the Court of Claims on May 12, 1988. On January 19, 1990, the Court of Claims found for defendant state, holding that plaintiffs had

proved neither breach of contract nor unfair or deceptive sales practices. On February 16, 1990, plaintiffs brought the instant, timely appeal, and the state cross-appealed.

Plaintiffs' first and second assignments of error are interrelated in that both pertain to the representations made by the commission to plaintiffs. Consequently, we shall discuss both assignments of error together. By their first assignment of error, plaintiffs allege that the commission violated R.C. 1345.02 and 1345.03 because its advertising constituted an unfair or deceptive sales practice. The trial court found that the commission had not violated the statute, concluding that:

> "*** [D]efendant's advertising does not specifically state that unclaimed prizes are [5] retained by defendant and placed in a designated fund, however the court finds that the defendant did not misrepresent its lottery games in this fashion. The court is of the opinion that defendant's advertising did not constitute unfair or deceptive sales practices. See R.C. 1345.02 and 1345.03." (Decision, p. 6.)

The Ohio Legislature enacted Chapter 1345 of the Ohio Revised Code to protect consumers from deceptive and unconscionable sales practices. The statute specifically provides that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02. Unconscionable acts or practices are similarly prohibited by R.C. 1345.03. A state agency commits an unfair or deceptive act or practice by making "[a]ny offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions." Ohio Adm. Code 109.4-3-02(A)(1).

Plaintiffs contend that the commission violated this section by failing to disclose that any unclaimed prizes would be placed in a fund and retained by the commission. The lottery advertisements, brochures, and tickets all explain that any player agrees to comply with the rules and regulations of the commission upon purchasing a lottery ticket. In turn, those rules and regulations require that any prize not claimed within one year of the drawing be placed in a fund and distributed pursuant to R.C. 3770.06. Ohio Adm. Code 3770:1-8-02(C). R.C. 3770.07 specifically provides that any unclaimed prize must be placed in a fund and distributed pursuant to R.C. 3770.06. Furthermore, both plaintiffs admitted that, had they known about the unclaimed prize fund, they would nevertheless have played the lottery on the dates in question. Because plaintiffs freely [6] admit that they were not influenced by the commission's representations, the absence of a detailed explanation did not affect their decisions to purchase the tickets. The illustrations of "material exclusions, reservations, limitations, modifications, and conditions" provided in the Ohio Administrative Code indicate that the commission's failure to disclose the information about the unclaimed prize fund was not an unfair or deceptive practice. Although the better practice would be for the commission to disclose the existence of the unclaimed prize fund, its failure to do so did not violate Ohio law and was not an unfair or deceptive sales practice. Accordingly, plaintiffs' first assignment of error is not well-taken.

Under the related second assignment of error, plaintiffs argue that defendant's advertisements were fraudulent misrepresentations in that each plaintiff was led to believe that, if he turned in the only valid winning

ticket, he would be entitled to one-hundred percent of the respective jackpot. The trial court found no reliance by either plaintiff and held in favor of defendant.

In order to prove a claim of fraudulent misrepresentation, the Ohio Supreme Court has held in *Cohen v. Lamko, Inc.* (1984), 10 Ohio St. 3d 167, that a plaintiff must prove the following elements:

> " '(a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> " '(b) which is material to the transaction at hand,
>
> " '(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> " '(d) with the intent of misleading another into relying upon it,
>
> [7] " '(e) justifiable reliance upon the representation or concealment, and
>
> " '(f) a resulting injury proximately caused by the reliance.' *Friedland v. Lipman* (1980), 68 Ohio App. 2d 255 [22 O.O.3d 422], paragraph one of the syllabus."

The trial court determined that neither plaintiff relied upon the commission's representations. Both plaintiffs testified that, being in the habit of purchasing lottery tickets, they would have purchased the tickets even if they had known of the unclaimed prize fund. Sufficient evidence existed to support the trial court's conclusion that there was no detrimental reliance and also that plaintiffs had not proven fraudulent misrepresentation.

Regardless of whether these particular plaintiffs relied on the commission's representations, the initial issue is whether the general public was misled by the commission's advertisements. As we stated in our discussion of the first assignment of error, the commission was not under a legal duty to disclose in its advertisements or promotional material the existence of the unclaimed prize fund. Nor was such an exclusion necessarily material to a consumer's decision as to whether to purchase a lottery ticket. Like the plaintiffs, many probably would have played the lottery even with the knowledge that any unclaimed prize would go into a designated fund and not be awarded to them if they were also winners. Most recognize the possibility of multiple winners, but few would anticipate that actual winners would fail to claim their prize.[1] Plaintiffs presented no evidence requiring a factual finding that the commission acted either [8] with reckless disregard for the truth or falsity of its advertisements, or with the intent to mislead.

Thus, the trial court was justified in finding that plaintiffs have not proven the elements of fraudulent misrepresentation on consumers. The commission did not fraudulently misrepresent, through its advertising, the parameters of the Ohio Lotto and Super Lotto games. Accordingly, plaintiffs' second assignment of error as it relates to the lottery advertisements is not well-taken.

The gist of plaintiffs' complaint lies in their breach of contract claims. By their second assignment of error, plaintiffs argue not only fraudulent misrepresentation but, also, that the terms of their contracts did not include the rules and regulations of the Ohio Lottery

[1] It may be this lack of anticipation that any winner of a substantial prize would fail to claim it that prompts plaintiffs' underlying apparent feeling that there cannot be another winning ticket.

Commission. Specifically, plaintiffs maintain that, since the rules and regulations pertaining to the unclaimed prize fund were not disclosed to the plaintiffs prior to their purchasing the lottery tickets, those rules and regulations were not terms of the contracts.

All parties agree that the lottery tickets are governed by contract law. *See* Annotation (1985), 40 A.L.R. 4th 662. The lottery card on which plaintiffs chose their numbers explained to plaintiffs that, upon purchase of a ticket, they "agree to abide by *all* rules and regulations of the Ohio Lottery Commission." (Emphasis added.) As such, plaintiffs agreed to abide by all rules and regulations, not just the five rules expressly printed on the ticket. In addition, on the reverse side of each winning lottery ticket appears the following language: "All tickets, transactions, drawings and prizes are subject to the Rules and Regulations [9] of the Ohio Lottery Commission."[2] The record supports the trial court's finding that plaintiffs agreed to abide by the rules and regulations upon purchasing the lottery tickets. For this court to come to any other conclusion would be to give little or no effect to the laws regulating the lottery within the state of Ohio. The correct principle is that persons are charged with the knowledge of the applicable law except in extraordinary circumstances. Here, the existence of the law, although not its provisions, was specifically called to the ticket holders' attention and made part of the contract. Accordingly, plaintiffs' second assignment of error is not well-taken.

Plaintiffs' third and fourth assignments of error raise the dispositive issue in this case: the definition of "winning ticket." Plaintiffs' basic argument is that a lottery ticket cannot be a "winning ticket" until it has

[2] The word "transactions" was not printed on Mr. DeJournett's ticket.

been presented to the commission within the one-year limitations period. Each plaintiff was the only holder of a ticket with the winning selected numbers actually to present the ticket to the commission for validation within one year. Plaintiffs argue, therefore, that they alone held winning tickets, and they alone are entitled to the full amount of the lottery prize.

The state counters that the rules and regulations controlling the purchase of the lottery ticket provide that, when more than one winning ticket is sold in a drawing, any unclaimed prize must be deposited into a specified fund pursuant to Ohio law. The money does not go to other winning-ticket holders such as plaintiffs.

[10] The Ohio lottery rules (Ohio Adm. Code 3770:1-6-05(A)) provide that winning tickets are determined at prize drawings:

> "Determination of Winning Tickets. Winners in all lottery games conducted by the Commission shall be determined at prize drawings. All prize winners shall be selected in accordance with random procedures to be approved and adopted by the Director. All tickets of a given price shall have the same probability of being selected to win a given prize."

A holder of a winning ticket as determined at the prize drawing must claim the prize award within one year of the announcement of the winning numbers. Ohio Adm. Code 3770:1-8-02(C) and R.C. 3770.07. According to the rules, the number of winning tickets is determined by the lottery computer at the time of the prize drawing. That is, once the six winning integers have been mechanically selected, the computer system for the lottery also determines the number of tickets actually sold which contain those six integers. The computer collects data of ticket sales and records the number of lottery tickets

sold, as well as the integers printed upon them. This computer record is vital to the functioning of the lottery. Without such a record, the commission would be unable to determine the number of winning tickets sold at the time of the prize drawing and would be unable to determine the amount to be paid to the presenter of a winning ticket. Furthermore, the unclaimed prize fund would serve no practical purpose.

Once the number of winning tickets has been ascertained from the computer record, the commission is able to calculate, pursuant to a formula in the Ohio Administrative Code, the fraction of the total prize award to be paid to each holder of a valid winning ticket. In both the Lotto and Super Lotto, a percentage of the total sales ("jackpot") is divided by the number of winning selections in order to determine the prize [11] award to be paid to each winner. Ohio Adm. Code 3770:1-7-33 and 3770:1-7-45. This computerized system allows the holder of a valid winning ticket to collect the full amount of the prize award immediately upon presentment of the valid winning ticket. If more than one winning ticket has been sold, any unclaimed portion of the jackpot is placed in a fund for a one-year period. During that one-year period, any other holders of a valid winning ticket may claim their portion of the prize award. Ohio Adm. Code 3770:1-8-02(C). The money is returned to the state lottery fund and distributed in accordance with R.C. 3770.06 if the prize awards are not claimed within the limitations period. R.C. 3770.07 provides in pertinent part:

> "*** Except as otherwise provided in division (B) of this section, if no valid claim to the prize award is made within the prescribed period, the prize money *** shall be returned to the state lottery fund and distributed in accordance with section 3770.06 of the Revised Code."

The Ohio Legislature enacted laws to deal with the distribution of any unclaimed prize awards when it passed R.C. 3770.06 and 3770.07. The plain and ordinary meaning of these statutory provisions indicates that any unclaimed prize award must be placed in a designated fund. See R.C. 3770.07. The intention of the legislature was apparently to use any unclaimed prize award as further state revenue. This construction of the statute yields a just and reasonable result as required under R.C. 1.47(G). Plaintiffs were not entitled to the remaining jackpots because the money was required to be placed in the unclaimed prize fund pursuant to statute. Accordingly, plaintiffs' third and fourth assignments of error are not well-taken.

[12] By their fifth and sixth assignments of error, plaintiffs contend that the computer records used by the commission to establish the existence of a second winning ticket constitutes inadmissible evidence. Plaintiffs first argue that the computer record was inadmissible hearsay and, second, that the computer record was unreliable.

We initially address plaintiffs' hearsay argument. Plaintiffs maintain that the trial court abused its discretion by admitting the computer records as business records under the hearsay rule. Defendant counters that the computer records do fall within the business-record exception for hearsay and were properly admitted by the trial court. We agree. Hearsay is defined by Evid. R. 801(C) as follows:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Clearly, the computer records are hearsay because they are out-of-court statements offered to prove the existence of the other winning tickets. The business-record exception to hearsay is stated in Evid. R. 803(6), as follows:

> "*** A memorandum, report, record, or *data compilation in any form, of acts, events, or conditions, opinion, or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to take the* memorandum, report, record, or *data compilation* all as shown by the testimony of the custodian or other qualified witness, *unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.* ***" (Emphasis added.)

Because the admission of evidence is within the trial court's discretion, an appellate court may reverse only upon a showing of an abuse of [13] discretion. *Robinson-Lloyds, Ltd. v. Dept. of Liquor Control* (1952), 91 Ohio App. 521.

The computer records are hearsay but do fall within the business-record exception under Evid. R. 803(6). The rule provides that the record may be "in any form" if kept in the regular course of business made at or near the time from information transmitted by the person having actual knowledge. This necessarily includes computer records if properly created and maintained. Ample evidence demonstrates that the computer records were kept in the course of regularly conducted business and were compiled as a regular practice and were created from information transmitted by a person with actual knowledge (*i.e.*, the person who pushed the appropriate

keys on the lottery machine). See Annotation: "Proof of Public Records Kept or Stored on Electronic Computing Equipment" (1976), 71 A.L.R. 3d 232, and Annotation: "Admissibility of Computerized Private Business Records" (1981), 7 A.L.R. 4th 8. The purpose of the business-record exception is to admit hearsay evidence that is reliable and trustworthy which would be accepted as accurate transactional records in the ordinary course of business dealings. The trial court did not abuse its discretion in concluding that the computer records fell within Evid. R. 803(6).

Plaintiffs nevertheless argue that, even if the computer records fall within the business-record exception to hearsay, they are so "untrustworthy as to be deemed inadmissible."

We note the absence in the record of any evidence which would demonstrate that the computer system malfunctioned or otherwise produced an unreliable report on the dates in question. Plaintiffs should have introduced, at the very least, some evidence that the commission's computer [14] incorrectly recorded a second winning ticket in each drawing. More precisely, plaintiffs needed to present evidence suggesting that some malfunction of the computer system occurred on the dates in question causing the terminals to record incorrectly the sale of the second winning tickets. Without such evidence, the trial court properly admitted the computer records. The trial court was not required to infer that the equipment malfunctioned solely because the second winning ticket was never presented for payment even if that be a reasonable inference. Whether to make such an inference lies with the trier of fact where, as here, the reason for the failure of the holders of the other winning tickets to present them is little more

than speculation, it being as reasonable to infer that the tickets were lost or misplaced prior to the drawing as to infer that the equipment malfunctioned. Plaintiffs' suggestion that the second tickets were never actually sold was mere conjecture and was insufficient to indicate that the records were untrustworthy. The trial court was persuaded by the commission's explanation that the second tickets were sold but were not presented to the commission. Such a finding is supported by the evidence.

It is not necessary to establish the reasons for the nonpresentment of the tickets. Rather, the issue is the reliability of the computer records. Since the evidence does not demonstrate the computer records to be so "untrustworthy as to be deemed inadmissible," the trial court did not abuse its discretion in admitting the records. Accordingly, the fifth and sixth assignments of error are not well-taken.

By its first cross-assignment of error, the state maintains that the Court of Claims erred in not granting the state's motion to dismiss. Regardless of the merits of this argument, any error by the Court [15] of Claims was harmless and did not prejudice the state. Accordingly, the first cross-assignment of error is not well-taken.

In its second cross-assignment of error, the state asserts that the Court of Claims erred in applying the Ohio Consumer Sales Practices Act to the Ohio Lottery Commission. This too, if it be error, was not prejudicial. Regardless of whether the law applies to a state agency such as the commission, plaintiffs cannot prevail on this claim. If the law does not apply to state agencies, the plaintiffs could not recover on this claim. On the other hand, if the law does apply, the plaintiffs, as we determined under the plaintiffs' first assignment of error,

have not established that the law was violated. Accordingly, the second cross-assignment of error is not well-taken.

As its third and final cross-assignment of error, the state argues that the Court of Claims erred in not finding that plaintiffs' counsel violated the disciplinary rules governing attorney conduct. The state argued that, because plaintiffs' counsel had served as a director of the Ohio Lottery Commission and was instrumental in enacting the lottery rules and regulations, he should have disqualified himself as plaintiffs' counsel pursuant to DR 4-101(B), DR 5-101(B), and DR 5-102(B). The involvement of plaintiffs' counsel with the drafting of the lottery rules and regulations does not disqualify him from representing plaintiffs in this matter. Rather, his prior connection goes only to his legal expertise in the area and his ability to represent plaintiffs. No unfair advantage as to factual or confidential matters prejudicial to the state are involved. This final cross-assignment of error is without merit and is not well-taken.

[16] For the foregoing reasons, all of plaintiffs' assignments of error are overruled, as well as defendant's cross-assignments of error, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

McCORMAC and BRYANT, *JJ.*, concur.

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

(Filed December 19, 1990)

No. 90AP-194

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

WILLARD PETERS, *et al.*,
Plaintiffs-Appellants,
(Cross-Appellees),

v.

THE STATE LOTTERY COMMISSION,
Defendant-Appellee,
(Cross-Appellant).

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on December 18, 1990, plaintiffs' assignments of error are overruled, as well as defendant's cross-assignments of error, and it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed.

WHITESIDE, MCCORMAC & BRYANT, *JJ.*
By /s/ ALBA L. WHITESIDE

DECISION OF THE COURT OF CLAIMS OF OHIO

(Filed January 19, 1990)

Case No. 88-05372

IN THE COURT OF CLAIMS OF OHIO

WILLARD PETERS, *et al.*,
Plaintiffs,

v.

STATE LOTTERY COMMISSION OF OHIO,
Defendant.

DECISION

On May 12, 1988, plaintiffs, Willard L. Peters and Earl DeJournett, Jr., filed this action against the defendant, the State Lottery Commission of Ohio. Plaintiffs individually participated in various state lottery games and fortuitously had the winning jackpot numbers in lottery drawings on separate occasions. They were awarded only one-half of the respective jackpots, since the state's lottery computer system indicated there was another winning ticket in existence in each drawing. Plaintiffs filed this joint suit because the other winning tickets in the two drawings were never presented for payment and, thus, it is asserted that they are entitled to the unclaimed monetary prizes.

Initially, the court must state that it is not of the opinion that plaintiffs were driven to file suit in this matter [2] due to greed and such is not an issue in this

case; the claims presented are certainly not frivolous. In addition, insofar as this case is concerned, the court is not overly concerned with the ultimate disposition of the unclaimed monies in the two pertinent jackpots. Whether the monies were transferred to the unclaimed prize fund, the general fund, or distributed to public schools is not relevant to the dispute between the parties.

On November 6, 1989, this action came on for trial. Counsel for the parties presented evidence, testimony and arguments as to the facts and issues involved herein. Upon consideration of the record, the court renders the following decision.

As authorized by an amendment of the Ohio Constitution, the General Assembly created the State Lottery Commission of Ohio through R.C. Chapter 3770. The defendant has thus been empowered to establish and operate lottery games within this state. Pursuant to statutory authority the defendant introduced the Ohio Lotto games in 1983. The Lotto was a pari-mutuel game in which winners were determined from ticket holders matching six (6) numbers from one (1) through forty (40). Another pari-mutuel game that produced large monetary prizes, the Super Lotto, commenced in February 1986. The Super Lotto is similar in nature to the Lotto, but a player must choose six (6) numbers from a pool of one (1) through forty-four (44); as a consequence of the [3] greater odds involved, the prize was substantially larger than the Lotto. The winning numbers are selected during a random drawing operated by the defendant. A ticket with the correct winning numbers entitles the ticket holder to a monetary award once the ticket holder has completed the validation process as outlined in defendant's regulations.

Willard Peters was successful in selecting the correct numbers in the July 30, 1986, Super Lotto drawing. Likewise, Earl DeJournett, Jr. chose the winning numbers in the regular Lotto drawing held on February 28, 1987. The defendant's computers indicated, however, that Mr. Peters and Mr. DeJournett each held one of two tickets sold with the correct numbers in the respective lottery drawings. Therefore, the defendant, following its procedures, determined that plaintiffs were entitled to one-half of the respective jackpots. Mr. Peters was awarded 2.5 million dollars of a 5 million dollar jackpot; Mr. DeJournett was awarded $630,819.00 of a $1,261,638.00 prize. Plaintiffs receive one (1) payment per year for a twenty (20) year period, after which period they will have received their full prize amount, albeit without interest on the monies withheld under this system of payment.

The other winning tickets in said drawings were never presented for payment within the one (1) year limitations period as mandated by R.C. 3770.07. Since no persons presented claims to the jackpot remainders within one (1) year of the respective [4] drawings, plaintiffs claim entitlement to the other halves of the respective jackpots.

Succinctly stated, plaintiffs contend defendant's computer system lacks sufficient reliability to establish the issuance of unpresented lottery winning tickets. Plaintiffs further allege that defendant's advertising and news releases were deceptive and that defendant misrepresented the lottery games to the public in reference to prize disbursements. Plaintiffs testified they were enticed to participate in the lottery contests by defendant's advertising. Plaintiffs assert that defendant promised, via advertising and pamphlets, that the

totality of all jackpots would be distributed to valid winning ticket holders, subsequent to presentment, in the event that all winners failed to produce a valid winning ticket within the limitations period. They claim that defendant failed to advertise that unclaimed prizes would not be fully disbursed and thus shared with the State of Ohio or be transferred to a fund to generate additional lottery games. At trial, plaintiffs identified various pieces of advertising, thereafter accepted as evidence, on which they say they relied in purchasing their lottery tickets. This advertising apparently led plaintiffs to believe that if only one "winner" were to "claim" a jackpot, then that winner would also be entitled to any and all unclaimed monies from that particular drawing. Plaintiffs assert that defendant's action of placing unclaimed prize money into a fund is equivalent to sharing their jackpot [5] with defendant—something not disclosed in defendant's advertising.

Plaintiffs allege that the "ticket *** together with the statutes, and rules and regulations *** constitute a written contractual agreement ***." Paragraphs eleven (11) and forty-two (42) of plaintiffs' complaint. Various sister states adhere to such a viewpoint and this court agrees that purchased lottery tickets constitute a contractual relationship between the state and the purchaser. See Annotation (1985), 40 A.L.R. 4th 662. In purchasing lottery tickets, plaintiffs accepted the terms of the defendant's public offer and thus agreed to the lottery's rules and regulations; therefore, plaintiffs' entitlement to a prize is governed by the conditions of the contract. See *Karafa v. New Jersey State Lottery* (1974), 129 N.J. Super. 499, 324 A. 2d 97; *Coleman v. State* (1977), 77 Mich. App. 349, 258 N.W. 2d 84; *Van*

Gulik v. Resource Dev. Council for Alaska, Inc. (Alaska, 1985), 695 P. 2d 1071, (wherein courts have held lottery tickets create contracts and as such incorporate the rules and regulations of the state's lottery.) Information concerning the rules and regulations of Ohio's lottery games are clearly displayed in bold letters on the back of the lottery bet slip. In addition, it states, in pertinent part, that "[u]pon purchase of a ticket, players agree to abide by all rules and regulations of the Ohio Lottery Commission." The court has reviewed pertinent contract law, the defendant's rules and [6] regulations, defendant's advertising techniques and other relevant facts and is of the opinion that a breach has not occurred.

The court agrees with plaintiffs that defendant's advertising does not specifically state that unclaimed prizes are retained by defendant and placed in a designated fund, however the court finds that the defendant did not misrepresent its lottery games in this fashion. The court is of the opinion that defendant's advertising did not constitute unfair or deceptive sales practices. See R.C. 1345.02 and 1345.03.

Jackpots are not shared with the State of Ohio; prize money is available to a winning ticket holder for one year and if it is unclaimed the prize is to be placed in a fund and is later distributed through other contests. R.C. 3770.07 is clear that the defendant is required to account for prize awards that have not been claimed. In reading the statutory law, regulations, and listening to testimony at trial, it is evident that any unclaimed prize money must be transferred into a fund for future lottery contests and may not be awarded to a holder of another winning ticket in the particular contest. See Ohio Adm.

Code 3770:1-8-02(C) and R.C. 3770.06. Plaintiff Willard Peters candidly admitted that if he had known about the unclaimed prize fund he would not be seeking recision of his contract with defendant.

Plaintiffs contend that a "winning ticket" is one that is [7] *presented* to defendant for payment. Defendant, however, asserts that a winning ticket is determined by the lottery computer system. Therefore, the basic issue in this case is what constitutes a "winning ticket."

Plaintiffs placed into issue the reliability of the lottery's computer system. Plaintiffs also suggested that some computer problems may have developed around the time when their jackpots were declared due to a change in operator contracts and the installment of a new telecommunications system. They assert that the computer may have mistakenly fabricated the second winning ticket in the two lottery games at issue.

The court heard extensive testimony concerning the defendant's computer system—its function and technical operations. The court shall not delve into the computer's operations herein but it should be noted that the court's thirst for knowledge concerning the computer system was surely quenched. The evidence indicated that the information concerning the other winning selections, supplied by the computer, in each of plaintiffs' Lotto games was accurate. The court was impressed by the testimony concerning the defendant's alternate computer system (if a problem occurs with the main computer) and the defendant's quality assurance procedures; the court is, therefore, satisfied that the computer system was reliable and did not err on the dates involved.

Ohio Adm. Code 3770:1-6-05(A) states that "[w]inners in all lottery games conducted by the Commission shall be *determined at* [8] *prize drawings.*" (Emphasis added.) The court is of the opinion that if a "winner" is determined at the time of the drawing itself, such can only be accomplished through the use of its computer system. There is no statutory language to the effect that the defendant must wait one (1) year to witness the presentment of winning tickets before it *determines* and declares how many winning selections there were in a particular contest. The court agrees with the defendant's position in this regard:

> The games include a rollover function. If no one is deemed to be the winner, then the prize rolls over into the next drawing. On the other hand, if one or more persons are deemed to be a winner, then the pool of money is extinguished and a new pari-mutuel pool begins with the next drawing. If presentment of a ticket were required to determine whether there is a "winner," then the Lottery might have to wait 365 days to determine if one pool had ended and another should begin.

Upon review of the evidence and the applicable law, the court finds that the totality of the evidence shows that the words "winning ticket" do not connote presentment of a ticket, but rather the information supplied to defendant through its computer system *identifying* the number of winning selections out of the player pool. The court is of the opinion that a computer mistake, producing the other winning tickets, was a remote possibility—a possibility not proven *sub judice.* The court finds that the plaintiffs have failed to prove by a preponderance of the evidence that the other winning tickets did not exist.

[9] In conclusion, the court received substantial testimony and evidence in this matter and has carefully scrutinized the allegations in conjunction with the pertinent law. The court concludes that defendant's advertising did not cause plaintiffs to rely on such to their detriment. Plaintiffs decided to play the lottery of their own volition and agreed to abide by the lottery's rules and regulations upon purchase of the tickets. The defendant's rules and regulations are reasonable and fair. Without such rules the games would lack integrity; there would be no assurance that the contests would be conducted in an orderly manner, that players would be treated equitably, that the state would be protected against fraudulent claims, or that the anticipated revenue would be produced.

The plaintiff has not proven by a preponderance of the evidence that presentment of a lottery ticket for a prize constitutes "winning" or a "winning ticket." The totality of the evidence demonstrates that the integers revealed at the prize drawing and subsequent computer determination of those purchased tickets matching the numbers determines how many winning tickets or selections have occurred and, therefore, how the prize shall be divided, if at all.

The court is of the opinion that plaintiffs' arguments are ingenious and not frivolous; however, the court finds that defendant's interpretation correctly construes the intent of the controlling regulations. Thus, for the foregoing reasons, the [10] court finds that plaintiffs' complaint is not well-taken and must be dismissed. Judgment shall be rendered in favor of the defendant, the State Lottery Commission of Ohio, and the complaint shall be dismissed.

/s/ RUSSELL LEACH
Judge

ORDER OF THE SUPREME COURT OF OHIO DENYING PETITION FOR REHEARING

(Dated May 6, 1992)

Case No. 91-331

THE SUPREME COURT OF OHIO

WILLARD PETERS, *et al.*,
Appellants/Cross-Appellees,

v.

STATE LOTTERY COMMISSION,
Appellee/Cross-Appellant.

REHEARING ENTRY

(Franklin County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 90AP194)

/s/ THOMAS J. MOYER
Chief Justice

OHIO ADMINISTRATIVE CODE
3770:1-7-33

3770:1-7-33 Ohio lottery commission game number thirty-three

(A) Title and Term. Ohio Lottery Commission game number thirty-three, "LOTTO", shall be conducted at such times and for such periods as the commission may determine. For the purpose of this rule, "Sales Cycle" shall mean any such period beginning on the date when ticket sales are commenced and continuing through the date established by the director as the date on which agents are to make their final settlement in respect to such period.

(B) General Design.

(1) Game Number thirty-three is a lottery game of the type generally known as a number match game.

(2) Each ticket in game number thirty-three shall be imprinted with one set of six unique numbers from the set of integers one through forty inclusive, as determined by the choice of the ticket purchaser, and recorded on the ticket at the time of purchase. Each group shall be referred to hereinafter as a "selection."

(3) At such times as determined by the Director, drawings will be conducted at which six unique numbers shall be selected at random from the set of integers one through forty inclusive. Holders of valid winning tickets for a given drawing bearing the numbers drawn in that drawing, in whole or in part, shall be entitled to a prize award in accordance with this rule.

(C) Price of tickets. The price of a ticket issued by the commission in game number thirty-three shall be one dollar.

(D) Structure nature and value of prize awards. Based upon the numbers drawn in each regular drawing for game number thirty-three, prizes shall be awarded to holders of valid tickets for that drawing as follows:

(1) For each ticket bearing a selection which matches four, and only four, of the six integers drawn, a prize equal to forty per cent of fifty per cent of total sales for that drawing divided by the number of such winning selections, rounded to the next lowest whole dollar amount.

(2) For each ticket bearing a selection which matches five, and only five, of the six integers drawn, a prize equal to fifteen per cent of fifty per cent of total sales for that drawing divided by the number of such winning selections, rounded to the next lowest whole dollar amount.

(3) For each ticket bearing a selection which matches all six integers drawn, a prize equal to forty-two per cent of fifty per cent of total sales for that drawing (hereinafter "Jackpot"), divided by the number of such winning selections, rounded to the next lowest whole dollar amount. The director shall have discretion to change the percentages which represent the prize pools in each of the categories referred to herein in paragraphs (D)(1), (D)(2) and (D)(3).

(4) At the discretion of the director, the amount of money in the jackpot may be deposited with the treasurer of state, or used to purchase annuities, such that an increased prize may be paid to jackpot winners on a deferred annual schedule.

(5) The minimum jackpot amount in any jackpot for which at least one ticket bears a winning selection shall be two hundred fifty thousand dollars.

(6) Any amounts remaining in the prize funds described in paragraphs (D)(1), (D)(2) and (D)(3) after any given drawing, whether due to no ticket having been issued bearing a winning selection for those prizes, or due to residual amounts after prize disbursement, shall be carried forward in the same fund for the next drawing.

(E) Frequency of prize drawings. Drawings shall be held at times determined by the Director.

(F) Winner of prize drawings.

(1) Prize drawings shall be open to the public and may be held at such places in the state that the director shall determine. The director shall inform the public as to the time and place of each prize drawing.

(2) All holders of valid tickets for a given drawing are eligible to win in that drawing. Prize winners shall claim their prizes won in drawings by surrendering their tickets in accordance with the procedures of these rules.

(3) All drawings in game number thirty-three will be conducted in accordance with random procedures approved by the director. For every drawing in game number thirty-three, the director will approve procedures and mechanisms for the selection of winners and the awarding of prizes in order that random selection will be achieved.

(G) Validity of Tickets.

(1) Each purchaser of tickets in game number thirty-three shall be responsible for verifying that the numbers imprinted on such tickets are those he requested, that the purchase price paid is the price recorded on such ticket, and that such ticket has recorded thereon the type of bet or bets, and the drawing date or dates therefor, that the purchaser desired to make.

(2) Each ticket issued in game number thirty-three shall have imprinted thereon at the time of purchase, a control number and bar code data supplied by the commission. No prize shall be paid by the commission with respect to any tickets without such control number or bar code data.

(3) All tickets in game number thirty-three are subject to validation under procedures to be established by the director before the payment of any prize thereon.

(4) In addition to, but not in limitation of, all other power and authority conferred on the director by the commission's rules, the director may declare a ticket in game number thirty-three to be void if it is stolen, not sold or deemed not sold in accordance with commission rules; if it is illegible, altered, or counterfeit; or if the ticket fails any of the validation tests or procedures established by the director pursuant hereto. The commission's liability and responsibility for a ticket declared void, if any, is limited to the refund of the retail sales price of the ticket.

(H) Director's conduct of game number thirty-three.

(1) The director shall conduct game number thirty-three in a manner consistent with the Lottery Act, the rules of the commission, including without limitation this rule, and the regulations of the director. As he deems it necessary or advisable, he shall adopt management regulations, orders or directives to implement and operate this lottery game.

(2) Names and definitions of elements of game number thirty-three used in this rule are to be considered generic terms used solely for the purpose of this rule. In actual operation, game number thirty-three and these elements may be given names or titles chosen by the commission.

(3) The director shall have discretion to combine existing or future games for promotional purposes in order to increase revenues and to create a different payment structure for prizes to be paid if games are combined, and to authorize any funding mechanism he deems necessary to accomplish payment of any prize pool.

HISTORY: Eff. 1-10-86.
3-11-83

3770:1-7-45 Ohio lottery commission game number forty-five

(A) Title and term. Ohio lottery commission game number forty-five, "Super Lotto," shall be conducted at such times and for such periods as the commission may determine. For the purpose of this rule, "sales cycle" shall mean any such period beginning on the date when ticket sales are commenced and continuing through the date established by the director as the date on which agents are to make their initial settlement in respect to such period.

(B) General design.

(1) Game number forty-five is a lottery game of the type generally known as a number match game.

(2) Each ticket in game number forty-five shall be imprinted with one set of six unique numbers from the set of integers one through forty-four inclusive, as determined by the choice of the ticket purchaser or the auto lotto feature of the computer system, and recorded on the ticket at the time of purchase.

(3) At such times as determined by the director, drawings will be conducted at which six unique numbers shall be selected at random from the set of integers one through forty-four inclusive. Holders of valid winning tickets for a given drawing bearing the numbers drawn in that drawing, in whole or in part, shall be entitled to a prize award in accordance with this rule.

(C) Price of tickets. The price of a ticket issued by the commission in game number forty-five shall be one dollar.

(D) Structure, nature and value of prize awards based upon the numbers drawn in each regular drawing for game number forty-five, prizes ahall be awarded to holders of valid tickets for that drawing as follows:

(1) For each ticket bearing a selection which matches three, and only three, of the six integers drawn, a prize of three dollars per winning ticket will be paid.

(2) For each ticket bearing a selection which matches four, and only four, of the six integers drawn, a prize equal to twelve and four-tenths per cent of fifty per cent of total sales for that drawing divided by the number of winning selections, rounded to the next lowest whole dollar amount.

(3) For each ticket bearing a selection which matches five, and only five, of the six integers draw, a prize equal to three and twenty-five hundredths per cent of fifty per cent of total sales for that drawing, divided by the number of winning selections, rounded to the next lowest whole dollar amount.

(4) For each ticket bearing a selection which matches all six integers drawn, a prize equal to seventy per cent of fifty per cent of total sales for that drawing (hereinafter "jackpot"), divided by the number of winning selections, rounded to the next lowest whole dollar amount.

The director shall have discretion to change the percentages which represent the prize pools in each of the categories referred to herein in paragraphs (D)(1), (D)(2), (D)(3) and (D)(4) of this rule.

(5) At the discretion of the director, the amount of money in the jackpot may be deposited with the treasurer of state, or used to purchase annuities, such

that an increased prize may be paid to jackpot winners on a declared annual schedule.

(6) The minimum jackpot amount in any jackpot for which at least one ticket bears a winning selection shall be two hundred fifty thousand dollars.

(7) Any amounts remaining in the prize funds described in paragraphs (D)(1), (D)(2), (D)(3) and (D)(4) of this rule after any given drawing, whether due to no winning ticket having been issued for those prizes, or due to residual amounts after prize disbursement, shall be carried forward in the same fund for the next drawing.

(E) Frequency of prize drawing. Drawings shall be held at times determined by the director.

(F) Manner of prize drawings.

(1) Prize drawings shall be open to the public and may be held at such places in the state that the director shall determine. The director shall inform the public as to the time and place of each prize drawing.

(2) All holders of valid tickets for a given drawing are eligible to win in that drawing. Prize winners shall claim their prizes won in drawings by surrendering their tickets in accordance with the procedures established by these rules.

(3) All drawings in game number forty-five will be conducted in accordance with random procedures approved by the director. For every drawing in game number forty-five, the director will approve procedures and mechanisms for the selection of winners and the awarding of prizes in order that random selection will be achieved.

(G) Validity of tickets.

(1) Each purchaser of tickets in game number forty-five shall be responsible for verifying that the numbers imprinted on such tickets are those he requested, that the purchase price paid is the price recorded on such ticket, and that such ticket has recorded thereon the type of bet or bets, and the drawing date or dates therefor, that the purchaser desired to make. The Ohio lottery commission shall be free of any liability in connection with this paragraph.

(2) Each ticket issued in game number forty-five shall have imprinted thereon at the time of purchase, a control number and bar code data supplied by the commission. No prize shall be paid by the commission for any tickets without such control number or bar code data.

(3) All tickets in game number forty-five are subject to validation under procedures to be established by the director before the payment of any prize thereon.

(4) In addition to, but not in limitation of, all other power and authority conferred on the director by the commission's rules, the director may declare a ticket in game number forty-five to be void if it is stolen, not sold or deemed not sold in accordance with commission rules; if it is illegible, altered, or counterfeit; or if the ticket fails any of the validation tests or procedures established by the director pursuant hereto. The commission's liability and responsibility for a ticket declared void, if any, is limited to the refund of the retail sales price of the ticket.

(H) Director's conduct of game number forty-five.

(1) The director shall conduct game number forty-five in a manner consistent with the Lottery Act, the rules of the commission, including without limitation this rule, and the regulations of the director. As he deems it necessary or advisable, he shall adopt management regulations, orders or directives to implement and operate the lottery game.

(2) Names and definitions of elements of game number forty-five used in this rule are to be considered generic terms used solely for the purpose of this rule. In actual operation, game number forty-five and these elements may be given names or titles chosen by the commission.

(3) The director shall have discretion to combine existing or future games for promotional purposes in order to increase revenues and to create a different payment structure for prizes to be paid if games are combined, and to authorize any funding mechanism he deems necessary to accomplish payment of any prize pool.

HISTORY: Eff. 3-1-86 (1985-86 OMR 928)

OHIO REVISED CODE

To amend section 3770.07 of the Revised Code and to amend Section 66 of AM. Sub. H.B. 238 of the 116th General Assembly to permit the State Lottery Commission to hold "second chance" drawings for unclaimed lottery prizes and to make an appropriation.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 3770.07 of the Revised Code be amended to read as follows:

3770.07 Award of prizes; "second-chance" drawings; unclaimed lottery prizes fund [Eff. 6-24-86]

(A) Lottery prize awards shall be claimed by the holder of the winning lottery ticket, or by the executor or administrator of the estate of a deceased holder of a winning ticket, in a manner to be determined by the state lottery commission, within one year of the date on which such prize award was announced. ~~If~~ EXCEPT AS OTHERWISE PROVIDED IN DIVISION (B) OF THIS SECTION, IF no valid claim to the prize award is made within the prescribed period, the prize money or the cost of goods and services awarded as prizes, or if such goods or services are resold by the commission, the proceeds from such sale, shall be returned to the state lottery fund and distributed in accordance with section 3770.06 of the Revised Code.

If a person entitled to a prize award is under eighteen years of age, or is under some other legal disability, and the prize money or the cost of goods or services awarded as a prize exceeds one thousand dollars, the director shall order that payment be made to the

order of the legal guardian of such winning ticket holder. If the amount of the prize money or the cost of goods or services awarded as a prize is one thousand dollars or less, the director may order that payment be made to the order of the adult member, if any, of such winning ticket holder's family legally responsible for the care of such winning person.

No right of any person to a prize award shall be assignable, except that payment of any prize award may be made to the executor or administrator of the estate of a winning ticket holder, and any person may be awarded a prize award to which another is entitled pursuant to the order of a court of competent jurisdiction.

No lottery prize award shall be awarded to or for any officer or employee of the state lottery commission, or any blood relative or spouse of such officer or employee living as a member of such officer or employee's household. Upon the payment of prize awards pursuant to this section the director and the commission are discharged from all further liability therefor.

(B) THE COMMISSION MAY ADOPT RULES GOVERNING THE DISBURSEMENT OF UNCLAIMED PRIZE AWARDS AS ALL OR PART OF THE PRIZE AWARD IN A LOTTERY AND MAY, PURSUANT TO THOSE RULES, CONDUCT THE LOTTERY AND DISBURSE ANY SUCH UNCLAIMED PRIZE AWARDS. ANY LOTTERY IN WHICH ALL OR ANY PART OF THE PRIZE AWARD IS PAID FROM UNCLAIMED PRIZE AWARDS SHALL BE CONDUCTED IN ACCORDANCE WITH ALL OF THE OTHER REQUIREMENTS OF THIS CHAPTER, INCLUDING, BUT NOT LIMITED TO, THE TIME AND PROOF

REQUIREMENTS OF THIS CHAPTER, INCLUDING BUT NOT LIMITED TO, THE TIME AND PROOF REQUIREMENTS FOR CLAIMING AWARDS AND THE DISPOSITION OF UNCLAIMED PRIZE AWARDS WHEN THE PRESCRIBED PERIOD FOR CLAIMING THE AWARD HAS PASSED. A PRIZE AWARD OR ANY PART OF A PRIZE AWARD THAT IS PAID FROM AN UNCLAIMED PRIZE AWARD SHALL NOT BE REAPPLIED TOWARD THE SATISFACTION OF THE REQUIREMENT OF DIVISION (A) OF SECTION 3770.06 OF THE REVISED CODE THAT, AS NEARLY AS IS PRACTICABLE, FORTY-FIVE PER CENT OF THE TOTAL REVENUES FROM TICKET SALES BE DISBURSED FOR MONETARY PRIZE AWARDS, IF SUCH UNCLAIMED PRIZE AWARD WAS PREVIOUSLY APPLIED TOWARD THE SATISFACTION OF THAT REQUIREMENT. ON OR BEFORE THE LAST DAY OF JANUARY AND JULY EACH YEAR, THE COMMISSION SHALL REPORT TO THE GENERAL ASSEMBLY THE GROSS SALES AND NET PROFITS THE COMMISSION OBTAINED FROM THE UNCLAIMED PRIZE AWARDS IN LOTTERIES CONDUCTED PURSUANT TO THIS DIVISION DURING THE PRECEDING TWO CALENDAR QUARTERS, INCLUDING THE AMOUNT OF MONEY PRODUCED BY THE GAMES FUNDED BY THE UNCLAIMED PRIZE AWARDS AND THE TOTAL REVENUE ACCRUING TO THE STATE FROM SAID PRIZE AWARD LOTTERIES CONDUCTED PURSUANT TO THIS DIVISION.

THERE IS HEREBY ESTABLISHED IN THE STATE TREASURY THE UNCLAIMED LOTTERY PRIZES FUND, TO WHICH ALL UNCLAIMED PRIZE AWARDS SHALL BE TRANSFERRED. ANY INTEREST WHICH ACCRUES ON THE AMOUNTS IN THE FUND SHALL BECOME A PART OF THE FUND AND SHALL BE SUBJECT TO ANY RULES ADOPTED BY THE COMMISSION GOVERNING THE DISBURSEMENT OF UNCLAIMED PRIZE AWARDS.

Supreme Court, U.S.
FILED
SEP 3 1992
OFFICE OF THE CLERK

NO. 92-236

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLARD PETERS and EARL DEJOURNETT, JR.,
Petitioners,

v.

THE STATE LOTTERY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT IN OPPOSITION TO CERTIORARI 2

CONCLUSION 4

APENDIX A1

Rule 14(h), Rules of the United States Supreme Court A1

TABLE OF AUTHORITIES

Cases **PAGE**

Fletcher v. Peck, 10 U.S. 87 (1810) 3

Toledo v. Reasonover, (1965) 5 Ohio St.2d 22 2

Statutes

Ohio Revised Code Section 3770.07 ..... 1, 3

Article I, Section 10, United States Constitution 3

Miscellaneous

Rule 14(h), Rules of the United States Supreme Court ... 2

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THE STATE LOTTERY COMMISSION,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioners seek to raise issues of due process and violation of the constitutional prohibition against impairing the obligation of contracts. However, neither issue was raised in the Ohio Courts until petitioners' application for rehearing in the Ohio Supreme Court. There is no justification for this Court reaching, on certiorari, issues that were not properly presented to the Ohio Courts.

In addition, each claim is without merit. There has been no retroactive application of a statute so as to impair the obligation of a contract or the misconstruction of a state statute so as to violate due process. While current Ohio Revised Code Section 3770.07 was amended subsequent to the game rules controlling petitioners' contracts with the Lottery, the amendment changed none of their substantive

rights. The amendment merely allowed the Lottery to fund other games from unclaimed prizes, whereas previously the unclaimed prizes were returned directly to the State Treasury. In either event, the Lottery statutes still required unclaimed winning selections to be treated as unclaimed prizes.

ARGUMENT IN OPPOSITION TO CERTIORARI

This case arises from a basic contractual dispute between petitioners and the Lottery over the amount of the prizes they won in their respective drawings. Despite attempting to put a constitutional overlay on their claims, the case involves state law issues as to the construction of the Lottery's statutes and rules, and not issues of constitutional dimension. At best, the case involves only these two petitioners on issues of contract which each level of the Ohio judiciary unanimously rejected. There could be no more wasteful expenditure of this Court's resources than to accept this case.

Most egregious is the failure of the petition to comply with Rule 14(h), Rules of this Court. Rule 14(h) requires the petitioners to identify in detail, where federal constitutional claims were presented in the state courts so that the petition, "will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." While petitioners do state that their application for rehearing contained the "obligation of contract claim" (Petition, page 10), petitioners never squarely admit to the Court that this is the first time the claim was ever set forth. It is cornerstone law in Ohio that the failure to raise and litigate an issue in the lower courts is an impediment, by waiver, to consideration of the issue by the appellate courts. *Toledo v. Reasonover,* (1965) 5 Ohio St.2d 22. As petitioners' obligation of contract claim was not even mentioned until rehearing, one cannot conclude that the Ohio Supreme Court considered or decided such issue on the merits.

Apparently recognizing their dilemma, petitioners appear to argue that they couldn't have known they had an "obligation of contract" issue until after the Ohio Supreme

Court had ruled, since, according to petitioners, the lower courts had never set forth a statutory analysis in rejecting their claims. (Petition, pages 10, 12). However, both the trial court and the court of appeals specifically cited to the operation of Ohio Revised Code section 3770.07 in rejecting petitioners' claims. (Petition Appendix, pages A14, 19-20, 31). Moreover, the record of the case shows petitioner Peters was advised by letter that his claim was being denied because of the unclaimed prize statute. (Petition Appendix, page A2). There is absolutely no reason why constitutional claims couldn't have been perceived and presented. The constitutional claims presented here are a last gasp chance to revive state law claims that have been firmly rejected.

The claim of constitutional violation is itself frivolous. The whole premise of the argument is that somehow petitioners would have won based on an analysis of the game rules, but for the Ohio Supreme Court's application of the amendment to Ohio Revised Code section 3770.07 retroactively to their case. The decision of the Ohio Supreme Court shows otherwise. While it is true that the Ohio Supreme Court mentioned Ohio Revised Code section 3770.07 in its decision, the Court also stated, "appellants' contentions must fail for yet other reasons." (Petition Appendix, page A5). Even if the Ohio Supreme Court was wrong in its application of Ohio Revised Code 3770.07, it was one of several alternative bases for decision.

More importantly, the Ohio Supreme Court's decision did not apply Ohio Revised Code section 3770.07 in a manner so as to violate Article I, Section 10 of the United States Constitution. To impair the obligation of contracts, a statute must operate retroactively to take away certain rights vested under the contract. *Fletcher v. Peck*, 10 U.S. 87, (1810). Here no substantive rights have retroactively been divested.

Petitioners' premise again is that somehow it is only the amendment to Ohio Revised Code section 3770.07 that defeats their claim. The amendment only allowed the Lottery Commission to utilize unclaimed funds in a new manner. The amendment is set forth in the Petition Appendix, pages

A45-48. Prior to the amendment, unclaimed funds were returned to the State Treasury. After the amendment, unclaimed funds could be used to fund other games. There always was an unclaimed prized statute which defeated petitioners' claims. There could not be an impairment of any right by the amendment of the statute, since the amended statute did not divest petitioners of any rights at all. At the time petitioners bought a lottery ticket, all lottery players were subject to the unclaimed prize. The same was true after the amendment.

CONCLUSION

There is neither procedural nor substantive merit to the petition. There simply is no justification why the Lottery should have to further defend an issue of state law which has unquestionably been decided in its favor, and even less justification why this Court should be burdened with it further. The petition should be denied.

Respectfully submitted,

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RULE 14(h), RULES OF THE UNITED STATES SUPREME COURT

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.